Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BONNIE J. KORESKO and
JOHN J. KORESKO, V,

Petitioner

v.

MARK FARLEY, SEATON ROSS, L.P., TOWNSHIP OF TREDYFFRIN, BRYN MAWR CUSTOM HOME, INC., and OLLIE BOWER,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a fundamental due process violation occurred when a state trial court and state appellate courts ignored and failed to address Petitioners properly raised federal claims under 42 U.S.C. §1983?

2. Whether a local subdivision Ordinance is constitutionally defective because it does mot require notice to adjoining land owners in all situations where their property rights will be permanently altered by operation of the proposed subdivision plan and contemplated development activity?

3. Whether the dearth of case law throughout the country on the question of whether encroaching roots from ancient boundary trees can be protected by prescriptive easement or equitable license requires clarification by this Court in cases involving 42 U.S.C.§1983

4. Whether Petitioners were denied fundamental due process when the state trial and appellate courts refused to properly adjudicate a petition for attorney disqualification due to conflict of interest, when such conflicted attorney was also a state actor who sought to aid deprivation of Petitioners' Property rights?

PARTIES TO THE PROCEEDING

Petitioner Bonnie Koresko is a citizen and resident of the Commonwealth of Pennsylvania. Petitioner John Koresko is an attorney and also a resident of Pennsylvania. At all times relevant to this case, Petitioners were the owners of residen-

tial real estate consisting of a house and a 1.3 acre parcel of land located in a very wooded part of Tredyffrin Township, Chester County, Pennsylvania. Ancient trees located on the Koresko property, but within a few feet of the boundary of an adjacent parcel, have grown naturally for decades to heights in excess of 75 feet. Roots and branches from the trees grew naturally and undisturbed across the boundary. Petitioners contend that this natural encroachment of the tree roots and branches created easements or other property interests in their favor. The destruction of certain of these roots, and the corresponding infringement by Respondents on Petitioners' property rights, precipitated the actions by Petitioners in the lower courts to seek equitable relief and/or compensation under the common law, the U.S. and Pennsylvania Constitutions, and 42 U.S.C. § 1983.

Respondent Tredyffrin Township, Chester County, Pennsylvania is a municipal corporation created and existing under the laws of the Commonwealth of Pennsylvania.

In its capacity as municipal government, Tredyffrin enacted subdivision ordinances as part of the Tredyffrin Township Code. The procedures, substance, and failure to enforce protections contained such ordinances were challenged in the lower courts and are the subject of this Petition.

Respondent Mark Farley is an adult individual and a citizen and resident of the Commonwealth of Pennsylvania. Mr. Farley was the land developer whose actions, which could only occur with the approval of Tredyffrin Township, resulted in the destruction of Petitioners' property.

Respondents Bryn Mawr Custom Home, Inc. and Seaton Ross, L.P. are entities controlled by Mark Farley that conduct business within the Commonwealth of Pennsylvania. At all relevant times Mr. Farley acted through these entities as well as in his own right in conducting the development activities which were subject of the Complaint advanced by Petitioners in the courts below.

Respondent Ollie Bower is the former owner of the tract of land adjacent to that of Petitioners developed by Mr. Farley (the "Bower tract"). Respondents Mr. and Mrs. Stephen Kay and Mr. and Mrs. Robert Grupp purchased and presently own the two houses Farley built on the Bower tract. The actions by Bower and Farley to subdivide the Bower tract into two lots, to build upon it, and thus cause damage to Petitioners' property was at various points approved or ratified by these parties in conjunction with the Township and Mr. Farley.

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OPINIONS BELOW

The opinion of the Chester County Court of Common Pleas is not a reported opinion and is included in the Appendix to this Petition.

The opinion of the Commonwealth Court of Pennsylvania is reported at 844 A2d 607 (Pa. Commwlth. 2003).

No opinion was issued by the Supreme Court of Pennsylvania in its denial of the Petition for Allowance of Appeal. by Order issued on August 9, 2004.

STATEMENT OF JURISDICTION

The Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on August 9, 2004. This was a final decision from the highest appellate court of the Commonwealth of Pennsylvania. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. 1257 (a).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code, Section 1983: Civil Action For Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 42 United States Code, Section 1985-Conspiracy to Interfere with Civil Rights

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is

lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President, Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Constitution of the Commonwealth of Pennsylvania, Article 1, Section 1:

Article 1-Declaration of Rights

That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE THAT –

Section 1. Inherent Rights of Mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Section 27. Natural Resources and the Public Estate

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

Title 53 Unconsolidated Pennsylvania Statutes Pennsylvania Municipalities Planning Code Article 9 §§ 1098, 10909; Article 10 §§ 1101-A to 11006

These portions of the Pennsylvania Unconsolidated Statutes are included in the attached Appendix

Code of the Township of Tredyffrin, Pennsylvania v. 26 Chapter 181-Subdivision and Land Development Article IV §§181-8 to 181-19

This portion of the Township Code is included in the attached Appendix.

STATEMENT OF THE CASE

In the courts below Petitioners advanced a properly pled action under 42 U.S.C. §§ 1983, and 1985. This cause of action as well as other Constitutional claims were simply ignored by the Pennsylvania courts. Petitioners sought to protect both substantive and procedural rights in the protection of their property interests, to wit: the lives of the ancient

trees located on their property, their right to the perpetual enjoyment of those trees, and their right to protect their property. The lower courts, in contradiction to well established principles of law and equity, held that Petitioners had no property interests worthy of protection. Those courts thus avoided the thorny questions of substantive and procedural rights protected by the U.S. Constitution and enforceable under 42 U.S.C. § 1983 et seq. The Township of Tredyffrin approved a subdivision plan for the Bower parcel adjacent to land owned by Petitioners. The subdivision plan was approved without any notice to the Petitioners because the Township's Subdivision and Land Development Ordinances do not require any such notice. The Bower parcel and Petitioners' property are located in a highly-wooded area zoned for single-family residential use. The properties share a 200 foot boundary line. Located on Petitioner's land next to the boundary line is a row of ancient trees. The trees are all over 50 feet tall and have an age averaging 68 years. Both branches and roots of these trees have grown naturally and unabated, 20 feet or more across the boundary onto the adjacent Bower tract. The growth of both branches and roots over the boundary line has continued unabated for well beyond 21 years.[1] Pursuant to development activity apparently permitted by the subdivision plan, Respondents amputated

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[1] An arborists' expert report, introduced as evidence below and presented here as Appendix M opines that the roots and branches have grown continuously on the Brower tract for a far longer time – averaging 64 years. Pennsylvania's minimum period for vesting of prescriptive rights is 21 years. *See Lewkowicz v. Blumish*, 442 Pa. 369, 275 A.2d 69 (1971).

the roots of the boundary trees, resulting in substantial damage and certain death of the trees.

Several months after Tredyffrin approved the subdivision plan, Petitioners discovered that Respondent owners and developers were about to begin construction on the Bower tract. Petitioners contacted the Township and its solicitor and requested that the Township refrain from issuing building permits. The request was denied and Petitioners were informed by the Township representatives that they had no right to stop the construction. Petitioners commenced suit in the Court of Common Pleas of Chester County, Pennsylvania. The complaint advanced causes of action for trespass, interference with easement, violations of due process rights, unlawful taking and violation of 42 U.S.C. §1983, appropriate equitable relief to prevent further damage, restitution and removal of offending uses.

Prior to the commencement of this case, William Lamb, the Tredyffrin Township solicitor, represented Petitioner John Koresko and his law firm in a related collection matter against Respondent Mark Farley. Before Petitioners had any notice of the subdivision plan, Mr. Lamb's firm acted as counsel in execution proceedings leading to levy against the Bower tract where the subdivision construction was scheduled. Judge Robert Shenkin, the same lower court judge in this case, stayed the execution proceedings upon the posting of bond by Mr. Farley.

On June 25, 2001 Petitioner John Koresko met with Mr. Lamb and others. Petitioner's concern was that in the course of his representation by Mr. Lamb and his firm, they were privy to confidential information that involved the property subject of the now disputed subdivision activity. Petitioner

was told that Mr. Lamb and his firm would be representing the Township in the instant case, but would take only a passive role in the dispute. Mr. Koresko, having raised the conflict issue, was assured that Mr. Lamb and his firm would not engage in any action adverse to Petitioner's interest. On this basis Mr. Koresko waived the potential conflict.

Approximately a year into the litigation Lamb's position changed. It became clear that the Lamb firm and the Township were acting in concert with Mr. Farley in the discovery process. More importantly, Mr. Lamb sent a letter to Mr. Koresko threatening an abuse of process action. In response Mr. Koresko wrote to Mr. Lamb stating the actions were in conflict with the June 25th agreement. Because the Lamb firm was representing the Township in an action that was directly adverse to Petitioners' interest, while continuing to represent Mr. Koresko in the collection matter, Mr. Koresko asked Mr. Lamb to withdraw from representing the Township. Lamb refused to do so and instead had his firm terminate its representation of Mr. Koresko in the other collection and levy matter involving Mr. Farley and the Bower tract.

Petitioner Koresko moved for the disqualification of Mr. Lamb. The trial court did not address the merits of the issue or hold any form of evidentiary hearing. It avoided any disposition by deeming the motion moot in light of its ruling on the underlying property right. The conflict of interest issue has been repeatedly raised in all of the lower courts and ignored. During the pendency of the appeals, Mr. Lamb, former Chairman of the Chester County Republican Party, received a political appointment to a vacant seat on the Pennsylvania Supreme Court. Governor Mark Schweiker

conditioned that appointment on Lamb's agreement not to subsequently seek election to retain the seat.

There has been no dispute that the Township Ordinance at issue contained no requirement to give any notice to adjoining landowners like Petitioners and that the ancient trees were mortally damaged as a result of the development. The trial court, in disposing of Petitioners' Motion For Partial Summary Judgment and Respondents' Motions for Judgment on the Pleadings, declined to acknowledge the existence of any property right of Petitioners. The trial court never addressed the cause of action clearly alleged under federal aw or any of Petitioners' constitutional claims, but nevertheless entered final judgment against Petitioners. Petitioners sought leave to amend pleadings prior to the filing of dispositive motions but leave was denied. Petitioners filed a timely appeal as to all issues.[2]

On appeal to the Commonwealth Court, Petitioners again raised the lack of notice requirements in the Tredyffrin Subdivision Ordinance, along with the nature of the Petitioners' property interests and infringement of same by Respondents. The Commonwealth Court noted that this was a "case of first impression" and affirmed the lower court's finding that no easement or other property right existed as to the tree roots. The Court also affirmed the lower court's refusal to permit

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[2] The Notice of Appeal was originally filed with the Superior Court of Pennsylvania. A motion was made on behalf of Tredyffrin Township to Transfer the Appeal to the Commonwealth Court which is the appropriate intermediate appellate court for disputes involving local governments. The Motion was granted and the matter proceeded in the Commonwealth Court.

amendment of pleadings, and held that the Pennsylvania Municipalities Planning Code was the excusive vehicle for challenging the validity of the subdivision. The equity actions were deemed to be moot. Of particular note are the issues the Commonwealth did not address in any fashion despite their having been raised by Petitioners. Petitioners asserted that the Township, the Developer, and property owners acted under color of state law to deprive Petitioners of their constitutionally protected rights to the use and enjoyment of the boundary trees. No mention was made by the Commonwealth Court of the questioned municipal ordinance or lack of notice, nor was there any mention made of the failure to enforce certain tree protection laws equally as to all citizens. The Court in very brief terms agreed with the lower court's denial of Petitioner's motion to disqualify Lamb's firm from representing the Township. The Court took no issue with the sparse record and litigation against a recent client whom Lamb dropped like the proverbial "hot potato."

A Petition for Allowance of Appeal was filed timely in the Pennsylvania Supreme Court. Petitioners advanced as reasons for granting an appeal: (1) the lower courts erred in holding that Petitioners had no property interest; (2) the actions of the Respondents herein impaired fundamental liberty and property interests of Petitioners in violation of the Constitutions of Pennsylvania and the United States; (3) Petitioners as adjoining landowners most likely to be harmed had standing to enforce provisions of the subdivision plan and complain about violations of restrictions and ordinances; and (4) the lower court's refusal to promptly address disqualification of the Lamb firm prior to making decisions on the merits cast an unacceptable pall over the proceedings as

Township Solicitor Lamb was also a state actor. The Pennsylvania Supreme Court denied the Petitions without opinion by Order on August 9, 2004.

REASONS FOR GRANTING THE WRIT

I. The failure of any of the lower courts to address the constitutional claims raised by the petitioners under 42 U.S.C. §1983 was a violation of due process

The Petitioners in Count V of their Complaint as filed in the Court of Common Pleas of Chester County, Pennsylvania (Appendix H) stated:

> "93. The allegations of the preceding paragraphs are incorporated by reference.
>
> 94. Plaintiffs have been denied their property rights without compensation or due process of law by the actions of the Defendants Farley and Bower in concert with Defendant Tredyffrin Township, its supervisors, employees, and agents, in violation of the Constitution of Pennsylvania and the United States of America and the applicable provisions of state and federal law.
>
> 95. Plaintiffs are entitled to equitable or legal relief in order to restore their property rights to a position existing prior to the grant of the Subdivision, or to be compensated through restitution for an unlawful taking."

Petitioners submit that these paragraphs, read in conjunction with the facts and allegations as pled in the incorporated

paragraphs, set forth both state and federal constitutional claims.

The claims advanced by Petitioners are on a par with those advanced in the matter of *Jordan v Fox, Rothschild, O'Brien and Frankel*, 20 F3d 1250 (3rd Cir. 1994). The Plaintiffs in *Jordan* sued when their lessor, acting through its attorneys, garnished funds in a bank account after obtaining a judgment by confession. The Third Circuit Court of Appeals held that the then current Pennsylvania procedures for executions upon confessed judgments violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution because defendant law firm, under the color of Pennsylvania civil procedures, "caused the state to forcibly to deprive [plaintiff] of its property without the pre-deprivation notice and hearing due process requires." *Id.* at 1267. In order to prevail on their federal claims, Petitioners must establish (1) the violation of a federally protected constitutional or statutory right, (2) by state action or action under color of law. *Id.*; *see Flagg Bros., Inc. v Brooks*, 436 U.S. 149, 156 (1978).

The Petitioners' Complaint in the lower courts was sufficient in that it alleged notice was not given before Petitioners were deprived of their property rights under the Subdivision Plan and subsequent development. The Township acted through its solicitor, Mr. Lamb, its manager, Mr. Joseph Janasak, and other Township employees. The Respondents acted under the Township's procedures for approval of subdivision plans, permits, and ongoing inspections of the construction activities conducted by Farley. The Township approved the development plan and issued the permits to Bower and Farley wherein the Petitioners' property was

taken without notice and compensation. Farley could not have acted absent the initial Township approval and continued satisfaction of Township inspectors who supervised construction and allowed it to continue despite clear deviations from the subdivision plan and the Township Code. These are clear 14th Amendment violations for which redress may be had under the Constitution and 42 U.S.C. § 1983.

Petitioners' complaint alleges not only the direct deprivation of property rights but also the constitutional defect in the Township ordinance. A crucial point in this assignment of error is that none of the lower courts fulfilled their constitutionally mandated duties by ignoring the federal claims, and the state appellate courts simply ignored them despite proper preservation of the issues and substantial briefing on appeal.

The Constitution charges the judicial branch of government with the duty of maintaining justice. The court system is supposed to work for the people. The Constitution defines the things the courts cannot do as well as those things the courts must do. Courts cannot simply duck federal questions that are properly raised. This tenet has been part of American jurisprudence since the beginning of this country. As Chief Justice Marshall said in Cohens v Virginia, (6 Wheaton) 19 U.S. 264 (1821):

> "It is most true that this court will not take jurisdiction if it should not, but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be

> brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be *treason to the Constitution*. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."

The Courts below did not perform their constitutional duty. None of them addressed the Petitioners' claim under 42 U.S.C.§1983. The most fundamental violation of due process has thus occurred, in violation of the 14th Amendment. To redress this constitutional violation, the Court should grant certiorari and issue a summary reversal.

II. The Tredyffrin Township Subdivision Ordinance is constitutionally defective as it fails to give notice to property owners whose property rights will be permanently altered by a proposed subdivision plan

The Tredyffrin Township Code contains in its Article III §181-7 et seq. (Appendix B) the ordinance(s) which set forth the procedures to be followed to obtain approval of a subdivision plan. The procedures to be followed depend on the classification of a subdivision as "major" or "minor". While the subject ordinance provides for public notice and hearing as to major subdivisions, there are no provisions for any type of notice as to "minor" subdivisions. The lack of notice is most notably demonstrated in the testimony of Joseph Janasek (Appendix I), the township manager, when he states: "There's no notice required. Certified letters are not sent in

any cases." (Appendix I, p. 9). The operation of the ordinance makes no provision for notice by either the township or land developer to adjoining property owners who may be affected by a proposed subdivision plan. This is a remarkable, constitutionally archaic deficiency in that the rights of an adjoining property owner could be protected by the simple requirement of a letter and the expenditure of postage for certified mail. In its present form an affected property owner only gets notice when the bulldozers begin to dig and the harm is already inflicted.

The lower courts and the Respondents have taken the position that no notice was required because under the particular circumstances of this case Petitioners had no cognizable property right. A brief examination of Pennsylvania law on the subject demonstrates the existence of a property right whether by prescriptive easement or permanent license.[3]

As the Commonwealth Court noted in its opinion (Appendix C) the question of whether a prescriptive easement over land arises from encroaching tree roots is one of first impression in Pennsylvania. However, prior Pennsylvania jurispru

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[3] Petitioners' claim arises from their interest in the tall trees that formed a natural boundary line between Petitioners' and the adjoining property. The interest is either and easement or a permanent license. The exact nature of the property interest may be subject to differing interpretations. What is clear is that under color of law a property right was exposed to deprivation. The builder did not list the trees on the subdivision plan. The subdivision plan provided for a 6 feet deep excavation along the boundary line, withing the dripline of Petitioners trees, for a driveway and utility lines. The excavation ripped right through the roots of the trees, which are now dying.

dence provided an alternative basis upon which to answer this question in the affirmative. The Pennsylvania Superior Court in *Jones v Wagner*, 425 Pa. Super 102, 624 A2d 166, *alloc. denied*, 536 Pa. 626, 637 A2d 286 (1983), recognized that prescriptive easements regarding tress could give rise to a cause of action in Pennsylvania. On the issue of tree branches creating an easement by prescription the Superior Court commented:

> "We cannot help but wonder whether the continued presence of encroaching tree branches, held openly, notoriously, hostility, and continually for 21 years would create a prescriptive easement in the airspace in which they hang. If this would be the case, and we can find no Pennsylvania law which would indicate that a prescriptive easement is not available in this situation, a land owner who suffers actual harm for the first time during the tree owner's twenty-second year of hostile ownership, might very well be precluded from seeking a judicial, or even a self-help remedy. This result while not entirely unforeseeable, is anomalous. However, if an action is available without a showing of damage, the land owner has no reason to complain if a neighbor's tree causes damage after the prescriptive period has run."

525 Pa. Super. at 112, n. 3, 624 A2d at 171, n. 3.

Alternatively the Petitioners asked the lower courts to consider the holding of *Morning Call v. Bell Atlantic Properties*, 761 A2d 139, 2000 Pa. Super 294 (2000). There the Superior Court recognized an equitable property right, "irrevocable license," for encroachments and uses of many dec

ades which do not quite fit the definition of prescriptive easement. Rather than find under Pennsylvania law the existence an easement, or alternatively, an irrevocable license, the Commonwealth Court ignored its sister appellate court entirely and instead adopted the reasoning of a Kansas *intermediate* appellate court, *Pierce v Casady*, 711 P2d 766 (Kan. Ct. App. 1985). *Pierce* was inapposite and incorrect in articulating the law of shared use and easements as to tree branches, especially as such uses exist in modern society.

While the Pennsylvania Supreme Court has not made a specific declaration as to the nature of the interest created in circumstances described in this case, and intermediate courts are in conflict, a property right does exist. The Pennsylvania Constitution, Article I, §27 provides:

> "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people."

A property owner, by virtue of his ownership of the land and the trees upon it, has a right to preserve environmental resources over which he has dominion. Under Article 1, section 1, of the Pennsylvania Constitution, the landowner has the express right to protect his property. Local governments under Pennsylvania's Constitution, Article 1, section 27 likewise have a duty to preserve and protect natural resources like trees. The private rights and public duties inter

sect. Not only does the private land owner have a property right in the trees, *but also the accompanying right to the enjoyment of the same*. Government has the affirmative duty to maintain and enforce its mandate to preserve the lives of trees, especially when it exercises dominion over public property or submits private property to government control by regulating the privilege of subdivision. The courts below forgot that the *privilege* of subdivision, regulatable under the police power of government, can never trump the *rights* of private property owners or the beneficiaries of a constitutionally-mandated public trust.

These rights are no less real than other property rights consistently recognized by this Court. In *Loretto v Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the restriction of the use of water was found to be a property right with a significant impact since the restriction of use extinguished all property value Id. at 319. In reaching this conclusion, the Court analogized the case to *United States v Causby*, 328 U.S. 256, 265, 66 S.Ct. 1062, 1067, 90 L.Ed. 1206 (1946), in which frequent flights immediately above a landowner's property were akin to a physical taking. "Even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); citing *Causby, supra.* The same rule must apply when a developer, given permission to act by the state, disregards an easement or irrevocable license, or simply takes an action that harms a neighbor's trees. The approval of the subdivision plan, issuance of permits, and allowance of the activities thereunder permitted the developer to kill ancient trees by amputating their roots. [Appendix M-Arborist Report.] This occurred

despite Tredyffrin's pre-existing ordinances that barred construction within the dripline of any tree. The trees as corporeal works of nature, and Petitioners' intangible right to enjoy their beauty and positive contribution to the environment, are no less protected property interests than the rights to use of water and air space without interference by government.

Petitioners submit that the existence of protected property rights is clear. As such, constitutional and statutory protections attach. Under the 14th Amendment to the United States Constitution as well as Article I, §1 of the Pennsylvania Constitution, all persons possess a protected interest in the possession, protection, and enjoyment of all their property, whether tangible (trees) or intangible (enjoyment). This Court has repeatedly ruled that the procedural rules of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter protected status of a liberty or property interest. *R v Com. Dept. of Public Welfare*, 535 Pa. 440, 451, 636 A2d 142, 147 (1993) quoting *Paul v Davis*, 424 U.S. 693, 710-711, 96 S.Ct. 1155, 1165, 47 L.Ed. 2d 405, 419 (1976) (footnote omitted).

The Due Process Clause of the Fourteenth Amendment requires at a minimum that the deprivation of life liberty or property must be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Mulane v Central Hanover and Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950). The Due Process Clause requires states to make efforts to provide notice to all parties whose interests are affected by proceedings in front of a tribunal. Where parties assert rights in the same piece of property, one party cannot claim the right under operation of statute without

proper notice to anyone whose rights may be affected. *Sniadach v Family Finance Corp. of Bay View*, 395 U.S. 337, 23 L.Ed. 2d 349, 89 S.Ct. 1820 (1969) (Wisconsin garnishment statute struck down for failure of notice provision); *Fuentes v Shevin*, 407 U.S. 67, 32 L.Ed. 2d 556, 92 S.Ct. 1983 (1972) (invalidating state replevin law which permitted ex parte procedure to seize goods; *North Georgia Finishing, Inc. v DiChem, Inc.* 419 U.S. 601, 42 L.Ed. 2d 751, 95 S.Ct. 719 (1975) (invalidating an *ex-parte* garnishment statute).

In the present case, Petitioners received no notice because notice under the ordinance is not required. Consequently, there was no opportunity or mechanism for Petitioners to voice opposition to a proposed subdivision or present evidence on their behalf as to the adverse effects to their property interests. This is what due process requires and its absence demonstrates the primary constitutional infirmity of the Tredyffrin Township Ordinances. It was error for the lower courts to ignore the federally protected rights of the Petitioners.[4]

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[4] Respondents have asserted that Petitioners did not have standing to bring the action as they were required to exhaust remedies under the Pennsylvania Municipalities Code 53 P.S.§10900 et seq. The administrative remedy was not exclusive. See *Matthews v Eldridge*, 242 U.S. 319, 98 S.Ct. 893 (1976) n.10. Availability of administrative remedies does not preclude raising constitutional claims in a court of competent jurisdiction. The Municipality Planning Code (MPC) does not trump the Fourteenth Amendment or 42 U.S.C. §1983. Moreover, any conceivable remedy under the MPC became effectively moot as Petitioners 'notice' was the destruction of their property.

III. The absence of state law necessitates this Court's clarification of the property right especially as it relates to claims under 42 U.S.C. §1983

Although the facts of this case are local in nature, there is an important national environmental issue to be resolved. In the absence of particular state law on an issue, the federal law will be authoritative. Blind and harsh application of common law is simply not appropriate in modern times. For example, the common law through much of history provided that a landowner's property rights extend from the ground to the heavens. The development of air travel caused modification of the common law to contemplate protection of only the air space a landowner could reasonably use. Just as air space rights required rearticulation of the common law so does the law as to ancient trees and the encroachment of root systems. The majority of persons in this county no longer live in rural communities. Subdivisions and property development has continued and communities are now comprised of neighbors who share property and tree lines in close proximity. There is a paucity of either statutory or case law. None of the cases provide any real guidance as to the nature of the property right and the protections attached thereto. It is necessary for this Court to clarify the law relating to encroaching tree roots and its effect all Americans who share boundaries with properties subject to future development.

This case presents one of those rare opportunities to fashion the common law in the United States.[5] The Court can

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[5] Petitioner's research discloses that at least 35 states appear to have not addressed the issues of prescriptive easement or irrevocable license in relation to encroaching tree roots. Most of the

state unequivocally that the right to enjoy a tree, and the right to protect it from destruction, is protected under the Constitution. Furthermore, the Court can eliminate another of those self-help remedies that barely breathe within the common law but are disfavored and almost extinct in modern society. Self-help remedies tend to cause social problems in a complex society like ours. The present case is conceptually no different than cases like *Sniadac,supra*, *Fuentes, supra*, and *North Georgia Finishing, Inc., supra* which struck down other types of self-help remedies absent notice of intent to harm a property right. *"False is the idea of utility that sacri*

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cases considering the issue have not reached the states' highest courts. In the absence of a state's declaration of common law, or an erroneous one, this Court's articulation of the common law can be binding, especially in cases litigated in federal courts. *See,* Van *Horne's Lessee v. Dorrance*, 2 Dall. 304, 310 (1795). After referring to various provisions of the constitution of Pennsylvania, Justice Paterson maintained, "it is evident that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man.... The legislature therefore had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without just compensation. It is inconsistent with the principles of reason, justice and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of the social alliance, in every free government; and lastly, it is contrary to the letter and spirit of the constitution." *Id.*, at 310. See also, *Fletcher v. Peck*, 10 U.S. 87 6 Cranch 87, 3 L.Ed. 162 (1810) (property rights protected from local attempts to impair title), *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Cohens v. Virginia*, 19 U.S. 264 (1821) (review of unconstitutional state court decisions).

fices a thousand real advantages for one imaginary or trifling inconvenience. . . ." Thomas Jefferson, Commonplace Book, 1774-1776.

California states a compromise rule in *Booska v. Patel,* 24 Cal.App.4th 1786 (1994). In *Booska*, the defendant had severed roots that extended under his property from a large ornamental tree that was part of the landscaping of the plaintiff's neighboring backyard, essentially killing the tree and forcing the plaintiff to have it removed. The *Booska* court acknowledged the ancient common law rule that a landowner has the right to cut the branches or roots of a neighbor's tree to the extent that they encroach onto the landowner's property, but held that this right is no longer absolute. The Court of Appeal held *that the right of landowners to trim trees encroaching onto their land is subject to a reasonableness standard. Booska, supra,* 24 Cal.App.4th at 1791-1792.

The New York and Connecticut courts protect all tree parts from unilateral, self-help destruction by adjoining landowners only when the trunks are bisected by the property line separating their respective lands. *Van Allen v. Town of Kinderhook.*, 263 N.Y.S.2d 491; 47 Misc. 2d 955 (Sup. Ct. 1965) *citing Robinson v. Clapp*, 65 Conn. 365 (1895). Those courts toiled with the old common law rule that allowed self-help cutting of roots but found it logical to bar such actions if the trunk were shared by both. *Under this "shared trunk" theory, either landowner has "the right to demand that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole."* This rule, while slightly more enlightened, retains an artificial and scientifically irrelevant distinction. There is no

logic in protecting all tree roots from destruction simply because a tree trunk is 1/1000th of an inch across a boundary line, yet affording no protection to the vitally important roots because the trunk comes through the ground 1/1000th inch to the other side of the line. This rule also presupposes the fiction that roots are somehow less important than trunks, and that a person has is no property right in the enjoyment of the tree attached to his property as a living creature of Nature.

Remarkably, the *Van Allen* court, citing *People v. Sutherland*, 252 N. Y. 86 (1929), recognized the possibility of prescriptive easements related to encroaching tree parts. In contrast, the Pennsylvania Commonwealth Court in this case joined the Kansas intermediate appellate court in *Pierce v. Casady*, 11 Kan. App. 2, 711 P.2d 766 (Ks. Ct. App. 1985), holding fast to the old common law self-help rule. *Pierce* involved about a split tree whose limbs were a potential danger to structures on a neighbor's property. The Kansas court allowed the neighbor to trim the tree limb back to the property line. However, the Kansas court clearly erred in saying "there is no case law indicating that an easement by prescription may be obtained by overhanging tree branches." There may have been no Kansas authority, but *Van Allen* and other cases, *see infra*, were decided 20 years or more earlier, and the law of prescriptive easements is older than that.

As stated previously, the Pennsylvania Superior Court in *Wagner v Jones*, 425 Pa. Super. 102, 624 A.2d 166 (1993) agreed with *Van Allen* and recognized the possibility of a prescriptive easement for encroaching tree parts. Admittedly, these reflections were in dicta, but a logical proposition of law stated in dicta does not render it erroneous. Even if those courts took the theory of prescriptive easements too

far, the Pennsylvania Superior Court recognized in *Morning Call v. Bell Atlantic, supra*, the theory of "irrevocable license" for long-standing uses of a servient tenement which do not quite satisfy all the requirements of prescriptive easement. "Irrevocable license" is commonly equated by scholars to the term "equitable easement." This theory has also found favor in California. For example, in *Hirshfield v. Schwartz*, 91 Cal.App.4th 749 (2001), the Court of Appeal held that an injunction granted to protect an encroachment from destruction was an equitable remedy, rather than an exclusive prescriptive easement. Essentially, the *Hirshfield* court applied the modern "reasonableness standard" of *Booksa* to discourage self-help and encourage the same equitable result *Morning Call* teaches in Pennsylvania.

Most important to this Court's consideration is the wisdom of the Pennsylvania Superior Court in *Jones v. Wagner, supra,* and its consideration of the limited amount of authority from other jurisdictions. *See generally*, Annotation, *Encroachment of Tree, Shrubbery, or Other Vegetation Across Boundary Line*, 65 A.L.R.4th 603. The *Jones* Court concluded: "Under the laws of those [aforesaid] jurisdictions who have confronted the issue, and henceforth ours, a showing that encroaching tree limbs, branches, or roots have caused sensible damage is not a pre-condition to exercising a self-help remedy." *Jones*, at 425 Pa. Super. 106. This rule should be the constitutional law of the United States when the self-help destruction of a Neighbor's tree roots ensues from a subdivision and construction procedure created, conducted, reviewed, approved and supervised by municipal officers, their agents, and the persons to whom they extend the privilege of development. A local government is liable for

implementation of an official policy, no matter how promulgated, if the policy acts to deprive a person of a federally protected right. Such a policy must be a deliberate or conscious one "made by lawmakers or by those who edicts or acts may fairly be said to represent official policy . . ." *Monell v. Department of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). Citizens have the right to expect that government will not give aid to those who seek to destroy property rights. Modern society has finally evolved to acknowledge the aesthetic value of trees, especially when our citizens see fewer and fewer of them. Science tells us that trees are essential to produce the oxygen which sustains our lives. Tredyffrin Township had an ordinance that actually demanded that no construction activities occur where it is likely that tree roots grow. The supreme law of this nation needs to evolve accordingly for the benefit of all Americans.

IV. The failure of the lower courts to address the issue of the disqualification of William Lamb, Esq. and his firm denied Petitioners' their right to due process of law.

Part of the record in the case below includes a Motion by Petitioners to Disqualify William Lamb, Esquire supported by the affidavits of John Koresko, Esquire and Virginia Miller, Esquire (Appendix J). As stated more fully in pp. 8-10, *supra*, Petitioner John Koresko, the sole shareholder of Koresko and Associates, P.C., initiated a fee collection matter against Mark Farley in the Court of Common Pleas of

Chester County, Pennsylvania. Judge Shenkin was also the assigned trial judge in that matter.

In June 2001 as part of this collection matter, before any construction began on the adjoining parcel of land, Petitioner John Koresko retained William Lamb, Esq. and his firm, Lamb, Windle and McErlane, P.C. as co-counsel with Virginia Miller, Esq.[6] The Lamb firm began execution proceedings in the collection matter against the same piece of land that was part of the now challenged sub-division plan. At all relevant times, Mr. Lamb or members of his firm acted as the Solicitor of Tredyffrin Township, and gave Respondents the information that "they had no rights" to stop the developer Farley from pursuing his building permits. Petitioner shared with Mr. Lamb and members of his firm confidential and privileged information relating to Mr. Koresko's strategies involving litigation with the same Mr. Farley.

Regardless of previously waiving Lamb's conflict as Township Solicitor when Lamb assured Petitioner that the Township would remain neutral in the present action, Petitioner revoked his waiver and demanded that Lamb resign once Lamb demonstrated no further neutrality. Lamb then terminated his relationship with Petitioner in a letter stating that given the firm's long relationship with the Township and the "very small matter" in which it represented Petitioner, it was dropping Petitioner as a client. (Appendix J. Miller Af

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[6] Ms. Miller is a Major in a Special Operations Combat C130 Air National Guard Unit subject to deployment at any time. Following the attacks of September 11, 2001, she was deployed overseas twice. As such, the Lamb firm's involvement in this matter became more than just local counsel.

fidavit). Lamb actually threatened Respondents, and his firm vehemently litigated this case against Respondents. Lamb's firm secured a judgment against Respondents.

Petitioners filed the appended Motion To Disqualify. Judge Shenkin never scheduled an evidentiary hearing or required Mr. Lamb to explain himself under oath. The Motion was given cursory treatment *and then deemed moot because the trial court granted judgment on the pleadings.* Despite presentation of the issue by Petitioners, the Commonwealth Court made no determination as to the propriety of the Lamb firm's actions or the lack of an evidentiary record at the trial court level. Most notably, the Commonwealth Court avoided any discussion of the unprecedented holding of the trial court, that *it did not have to rule on a disqualification motion when made since the apparently conflicted attorney eventually succeeded subsequently in having the case resolved with prejudice against his first client*! The Pennsylvania Supreme Court in its August 9, 2004 order did not comment on any aspect of the case, despite the repugnance of the holding below.

Ordinarily this type of procedural problem might not merit constitutional scrutiny. However, the facts of record con and newspaper reports in the Appendix support Petitioner's contention that the refusal by the lower courts to deal with the issue was a *de facto* deprivation of the right to due process.

As noted, Mr. Lamb was the Tredyffrin Solicitor and was also former chairman of the Chester County Republican Party At the time this case was appealed to the Commonwealth Court, Mr. Lamb was appointed by a Republican

governor to the Supreme Court of Pennsylvania[7] - the court with supervisory authority over the Commonwealth Court and trial Judge Shenkin. During Lamb's time as a Justice of the Pennsylvania Supreme Court, the Commonwealth Court faced the uncomfortable prospect of subjecting a sitting Justice to criticism of his ethical responsibilities. Despite the difficulties, Petitioners were entitled to proper consideration of the matter, and the trial court under these circumstances should have permitted the development of an evidentiary record. The Commonwealth Court simply compounded the problem by ignoring it. It would be difficult to question the professional conduct of a sitting Supreme Court Justice, who was a Township Solicitor and a state actor with potential liability under 28 U.S.C. § 1983.

Petitioners raised the issue one last time in the Pennsylvania Supreme Court. Any appellate court should be concerned with a precedent that allows an attorney in a conflict of interest situation to litigate a case to conclusion and have that conflict disregarded without a hearing because the conflicted lawyer prevailed on the merits. More disturbing is what the Pennsylvania Supreme Court already knew as it considered the instant case. During his very short time on the bench, then-Justice Lamb did not recuse himself in connection with a zoning case involving one of his law firm's clients. See Appendix S. The matter was no doubt of some embarrassment to the Court. In light of the failure of the Pennsylvania Supreme Court or the Commonwealth Court to even opine on the issues addressed herein, Petitioner can

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[7] Mr. Lamb had never served as a judge prior to his appointment to Pennsylvania's highest court.

only ask this Honorable Court to question why the judges and justices refused to consider the possibility that the process had been tainted. In this case, the appearance of impropriety reached constitutional proportions because the state actor at the heart of the controversy had apparent influence over the process and judicial review was so cursory.

CONCLUSION

For all of the forgoing reasons Petitioners respectfully request the Court grant certiorari and summary reversal and/or all appropriate relief consistent with the issuance of the Writ.

Respectfully submitted,

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